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Civil Justice Task Force Meeting

States and Nation Policy Summit | The Grand Hyatt | Washington, DC
December 6, 2013 | 2:30 p.m.-5:30 p.m.

2:30 p.m.	**Welcome and Introductions** *Rep. Lance Kinzer (KS), Task Force Co-Chair* *Victor Schwartz, Shook Hardy & Bacon, Task Force Co-Chair*
2:45 p.m.	**Task Force Update and Sunset Review Overview** *Amy Kjose Anderson, Task Force Director*
2:55 p.m.	**State Legal Reform Activity Update** *Lauren Sheets, American Tort Reform Association*
3:05 p.m.	**Model Legislation: Update to the Non-Economic Damages Act**
3:20 p.m.	**PRESENTATION: Reforming Archaic Discovery Rules on the Federal Level** *Keltie Hays Peay, Redgrave LLP*
3:30 p.m.	**Model Legislation: The Citizen Participation Act**
3:45 p.m.	**PRESENTATION: Patent Trolling Litigation: What Can the States Do?** *Phil Goldberg, Shook Hardy & Bacon*
4:05 p.m.	**PRESENTATION: Asbestos Bankruptcy Trust Reform: Fighting Fraud and Preserving Resources** *Mark Behrens, Shook Hardy & Bacon*
4:20 p.m.	**Model Legislation: Punitive Damages Standards Act**
4:35 p.m.	**Model Legislation: Update to the Private Enforcement of Consumer Protection Statutes Act**
4:55 p.m.	**Roundtable Open Discussion:** New Issues in Lawsuit Reform Around the Country
5:25 p.m.	**For the Good of the Order**
5:30 p.m.	**Adjournment**

American Legislative Exchange Council

Resolution on Transparency in State Attorney General Conduct

PURPOSE: To support the policy proposals in the US Chamber Institute for Legal Reform's State Attorney General Code of Conduct in order to assure high ethical standards in conducting the affairs of the Office of Attorney General and to protect the public confidence in the integrity of this important Office;

WHEREAS, public statements by State Attorneys General can have serious implications affecting the public interest, Attorneys General must exercise prudence and caution in the conduct of any media contact, limiting comment on matters of great significance to the public interest.

WHEREAS, a State through its legislative and executive functions establishes salaries, number and qualifications of personnel needed to carry out the duties of the Office of Attorney General, employment of outside counsel should only be undertaken when the lack of expertise of the Attorney General's office or a conflict of interest on the part of the Attorney General's office requires the use of individuals not employed by the State, and any such retention generally should be on a fixed fee basis whose terms are specified in a written agreement between the State and the outside counsel that is subject to public oversight;

WHEREAS, the affairs of the Office of Attorney General should be free of any appearance of favoritism or use of the Office to benefit a private party, any contract with outside counsel where fees are anticipated to exceed $1 million should be awarded based only on the conclusion of a competitive bidding process open to the public for oversight;

WHEREAS, those who conduct the affairs of the Office of Attorney General, including outside counsel, should be free of the appearance of conflicts of interests, any use of contingency fees should be extremely rare and any such fee should be capped so that total compensation is no higher than is reasonable under the circumstances, and the terms of any such agreement should be specified in a written agreement between the State and the outside counsel that is subject to public oversight;

WHEREAS, the conduct and decisions of outside counsel reflect on the State and affect its rights and responsibilities, the Attorney General should retain ultimate control and decision-making authority over the major issues in all cases where outside counsel is retained to represent the interests of the State;

WHEREAS, the personal, financial, and other business dealings of the State Attorney General should not affect or exploit the exercise of discretion or influence the Office of Attorney General;

THEREFORE BE IT RESOLVED, that the American Legislative Exchange Council supports consideration of policy requiring compliance by its Office of the State Attorney General and all personnel of such Office with the principles embodied in the State Attorney General Code of Conduct issued by the U.S. Chamber Institute for Legal Reform, so that the legal matters of the State are carried out in a manner that is fair and equitable and subject to oversight by the residents of such State.

Adopted by the Civil Justice Task Force on August 1, 2008. Approved by the ALEC Board of Directors on September 11, 2008.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Taking the Best: ALEC's Comprehensive Medical Liability Reform Proposal

Summary

The following is ALEC's summary to accompany *Taking the Best*. Some of the section descriptions are longer because of the length of the Section. All Section summaries indicate the state or source which supplied the suggested language.

Section 1 on Short Title, **Section 2** on Purpose and **Section 3** on Applicability and Scope is self-explanatory.

(Drafting Note: Sections 4-8 may be extracted and used as a stand-alone model bill.)

Section 4 on Limitation of Damage Awards is focused on the awarding of exemplary damages. The cap does not apply in case of specific felonies. The language comes from Texas statutes. Section 18 addresses the limitation on punitive damages.

Section 5 on Further Limitation of Damage Awards is focused on placing a $250,000 no exceptions cap on the awarding of noneconomic damages. Definitions for noneconomic damages, health care provider and professional negligence are provided. The language comes from California statutes.

Section 6 on Periodic Payment of Future Damages is focused on damage awards exceeding $50,000. Either party is allowed to request such an order from the court. If the plaintiff dies, the court must modify the future economic damage award. Damages for future loss of earnings cannot be reduced because of the plaintiff's death. There is legislative intent language on authorizing the entry of judgments through the periodic payment of future damages. The language comes from California statutes.

Section 7 on Collateral Source is focused on using the evidentiary standard to prevent "double dipping". Both the plaintiff and defendant can offer evidentiary evidence to prove receipt of benefits or to prove costs to secure those benefits. The drafting note recognizes alternative language on subrogation based upon a state's law on permitting or prohibiting subrogation. Using the California statutes, there are definitions for a health care provider and for professional negligence.

Section 8 on Contingency Fee Schedule applies whether the recovery is based upon a settlement, arbitration or judgment. The drafting note points out the alternative approaches are based on California or Florida statutes. Either alternative allows the plaintiff attorney to be reimbursed for all reasonable expenses. In California, an award of one million dollars allows the plaintiff attorney to receive a contingency fee of $221,000 in addition to payment for all reasonable expenses.

Section 9 on Establishment of an Alternative Dispute Resolution System language comes from Texas statutes.

Section 10 on Alternative Dispute Resolution with (or without) Contract contains a drafting note which indicates two alternatives. The first alternative mandates the process. The second alternative allows for the process to be voluntary. In the voluntary alternative, there is no requirement that the medical malpractice claim be arbitrated prior to litigation. This voluntary language comes from California statutes. Most courts require some effort for both parties to enter into a mediation process prior to going to trial. Some medical liability carriers prefer the voluntary process over a mandatory process.

Section 11 on a Medical Review Panel, Certificate of Merit procedure and a Pre-Litigation Medical Screening and Mediation Panel sets forth three alternatives as discussed in the drafting note. The Medical Review Panel language comes from Louisiana statutes. One of its designs is to eliminate frivolous lawsuits. The Certificate of Merit procedure language was developed by The Doctors Company based upon current statutes in various states. The Pre-Litigation Medical Screening and Mediation Panel language comes from Maine statutes. There is a drafting note on the definition of a "qualified medical specialist" in order to ensure that the current definition of a "health care provider" is included in the "qualified medical specialist" definition. Whether one or more of the alternatives are included in proposed legislation, it should be recognized that there will be ongoing administrative costs to institute the alternatives. It is expected that these increased annual costs will be offset by savings from instituting any of the alternatives.

Section 12 on Notice of Intent focuses on the need for the plaintiff to provide a ninety-day notice to bring a medical malpractice civil lawsuit. This language comes from California statutes.

Section 13 on Expert Witness Standards contains a drafting note which recognizes that the location of the medical treatment can have a direct bearing on the residency of the expert witness. This is prevalent in states where a significant portion of the population seeks medical treatment just beyond the state's border. This language comes from Texas and Alabama statutes. There is an evolving national standard of care and application in various treatment modalities. This is especially true in emergency room versus non-emergency room settings. Language on the uniqueness of medical treatment by emergency room physicians comes from California statutes.

Section 14 on Statute of Limitations requires an action be brought within two years after the injury becomes reasonably ascertainable, but not more than four years can elapse. The section recognizes the plaintiff's status as either a minor, being incapacitated, or imprisoned. Wrongful death actions are dealt with, as well. The language comes from Kansas statutes.

Section 15 on Joint and Several Liability focuses on its abolition. A defendant is only severally liable for the entire amount of the plaintiff's damages equal to the percentage of fault. The section contains definitions for "Acting in concert" and for "Fault". The language comes from Arizona statutes.

Section 16 on Immunities: State Sovereign and Emergency Care Provisions do not contain specific language from various state statutes. Instead, the drafting note recognizes that if immunity provisions are to be included in legislation, the states of Alaska, Florida, Nevada, Oklahoma and Virginia have enacted various immunity provisions for state and local governments and for the providing of emergency medical care. Immunity for a charitable entity recognizes that it could provide both charitable medical services and donated medical products. The drafting note indicates that further clarification can be sought from the American Legislative Exchange Counsel's model legislation on "Good Samaritan" care.

Section 17 on Pre-Judgment Interest Calculations specifies the rate as equal to two percentage points above the 26-week U.S. Treasury Bill rate. The pre-judgment interest accrues from the time of the loss and is paid upon the entire jury verdict award. The language comes from Washington statutes.

Section 18 on Limitation of Punitive Damages contains a drafting note which states that an alternative to a "hard" cap can be found by utilizing the American Legislative Exchange Council's Constitutional Guidelines on Punitive Damages Act. This alternative would enact the U.S. Supreme Court's decision establishing guideposts for courts to follow in determining the excessiveness of a punitive damage award. The section's language comes from North Carolina statutes.

Section 19 on Comparative and Contributory Negligence provides two alternatives as set forth in the drafting note. Modified comparative negligence means that the plaintiff's recovery is barred if his or her negligence exceeds the combined negligence of all the defendants. A pure form of comparative negligence means that the plaintiff's award is reduced in proportion to his or her relative degree of fault. A court or jury has discretion to bar a plaintiff's recovery if the plaintiff willfully or wantonly caused or contributed to the death or to the injury. The language on modified comparative negligence comes from Connecticut statutes and the legal doctrines of last chance and assumption of risk are abolished. The language on pure comparative negligence contains definitions for "economic" and "noneconomic" damages, and "recoverable economic" and "recoverable noneconomic" damages. The alternative language comes from the Arizona statutes.

Section 20 on Ostensible Agency contains a cap on recoverable damages. The language comes from Indiana statutes. A drafting note sets forth two alternatives allowing for a state's case and statutes to be reviewed on the issue of vicarious liability. The liability revolves around the status of being an independent contractor.

Section 21 on "I'm Sorry" language applies where the patient and/or family learns of the circumstances surrounding the injury. All "I'm sorry" statements, affirmations, gestures, or conduct expressing apology, sympathy, fault, etc. are inadmissible as evidence of an admission of liability or as evidence of an admission against interest. There are definitions for "relative", "representative" and "gestures". All of the language, except for the definition of "gestures" comes from Oklahoma statutes. The "gesture" definition was developed by The Doctors Company from applicable state statutes. The meaning of "fault" comes from statutes in Washington, Arizona, South Carolina, and Colorado.

Section 22 on Right of Contribution provides that all joint defendants have a right of contribution in medical malpractice civil actions. The language comes from Texas statutes.

Section 23 on Burden of Proof requires the proof to be clear, cogent and convincing evidence when the plaintiff has signed an informed consent form. The language comes from California statutes.

Section 24 on Definitions provides a definition for the terms "Claimant," "Health Care Goods or Services," and "Health Care Institution." These terms are used either explicitly or implicitly in the *Taking the Best*'s language and in medical liability claims and litigation.

Section 25 provides absolute immunity from liability for a health care provider, which includes a pharmacist in the prescription of medicine, and for a health care institution that volunteer their services without compensation during declared states of emergency, including an executive order, by any man-made, natural, or war-caused event. The language comes from the statutes of Delaware, Florida, and Louisiana.

Section 26 on Appeal from an Interlocutory Order outlines provisions under which a person may appeal from an interlocutory order of a district court, and allows a person to seek an appeal from an interlocutory order of a lower court in a medical litigation proceeding. The language is taken from Texas' 2003 comprehensive tort reform law.

Section 27 on Standards of Proof in Cases Involving Emergency Care deals with the standard of proof necessary to show medical negligence in emergency care situations. The language is taken from Texas' 2003 comprehensive tort reform law.

Section 28 on Severability is self explanatory.

Section 29 on Repealer is self explanatory.

Section 30 on Effective Date provides that the model act's provisions become effective upon signature by the state's governor. This is intended to provide immediate relief for those experiences a state's medical malpractice.

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Section 1. Short Title. This Act may be referred to as "**{insert state}**'s Comprehensive Medical Liability Reform Act."

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Noneconomic Damage Awards Act

Summary

The Noneconomic Damage Awards Act provides that an award for noneconomic damages shall not exceed ~~[$250,000[1]]~~a fixed amount adopted by the legislature or the amount awarded in economic damages, whichever amount is greater. Economic damages, such as medical expenses and lost income, are fully compensated and are not subject to the limitation.

Model Legislation

Section 1. {Title}

This Act shall be known and may be cited as the Noneconomic Damage Awards Act.

Section 2. {Definitions}

The following words, as used in this Act, shall have the meaning set forth below, unless the context clearly requires otherwise:

(A) "Noneconomic damages" means subjective, nonpecuniary damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, loss of enjoyment of life, injury to reputation, humiliation, and other nonpecuniary damages.

(B) "Economic damages" means objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.

Section 3. {Damage awards}

In any personal injury action, the prevailing plaintiff may be awarded:

(A) Compensation for economic damages suffered by the injured plaintiff; and

~~1 To allow legislature to make a judgment as to what is appropriate for the state and that particular period of time."~~

(B) Compensation for the noneconomic damages suffered by the injured plaintiff not to exceed:

(1) [INSERT DOLLAR AMOUNT]~~$250,000~~;[2] or

(2) The amount awarded in economic damages, whichever amount is greater.

Section 4. {Special damages findings required}

(A) If liability is found in a personal injury or wrongful death action, then the trier of fact, in addition to other appropriate findings, shall make separate findings for each claimant specifying the amount of:

(1) Any past damages; and

(2) Any future damages and the periods over which they will accrue, on an annual basis, for each of the following types of damages:

(a) Medical and other costs of health care;

(b) Other economic loss; and

(c) Noneconomic loss.

(B) The calculation of all future medical care and other costs of health care and future noneconomic loss must reflect the costs and losses during the period of time the claimant will sustain those costs and losses. The calculation for other economic loss must be based on the losses during the period of time the claimant would have lived but for the injury upon which the claim is based.

Section 5. {Severability clause.}

Section 6. {Repealer clause.}

Section 7. {Effective date.}

Originally adopted by ALEC's Civil Justice Task Force at the Spring Task Force Summit April 13, 2002. Approved by full ALEC Board of Directors May, 2002.

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[2] State legislatures have adopted statutory limits on noneconomic damages ranging from $250,000 to $1 million. The ALEC Noneconomic Damage Awards Act recognizes that the appropriate amount is a matter of public policy for consideration of each individual state. Due to the importance of protecting affordable and accessible healthcare, a few states have adopted lower limits on noneconomic damages in medical liability case than applicable in other personal injury cases. Some states have adopted a two-tiered limit, permitting higher noneconomic damage awards in cases involving injuries that are defined as catastrophic in nature. For more information on state-by-state limits, contact ALEC's Civil Justice Task Force.

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The Citizen Participation Act

Model Legislation

Section 1. {Definitions}

In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;
(ii) an official proceeding, other than a judicial proceeding, to administer the law;
(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;
(iv) a legislative proceeding, including a proceeding of a legislative committee;
(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;
(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;
(vii) a proceeding of the governing body of any political subdivision of this state;
(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or
(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Section 2. {Purpose}

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Section 3. {Motion to Dismiss}

(a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 6(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Section 4. {Hearing}

(a) A hearing on a motion under Section 3 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 3, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 3, except as provided by Subsection (c).

(c) If the court allows discovery under Section 6(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 3.

Section 5. {Ruling}

(a) The court must rule on a motion under Section 3 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 3, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;

(2) the right to petition; or

(3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Section 6. {Evidence}

(a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Section 7. {Additional Findings}

(a) At the request of a party making a motion under Section 3, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Section 8. {Appeal}

(a) If a court does not rule on a motion to dismiss under Section 3 in the time prescribed by Section 5, the motion is considered to have been denied by operation of law and, in this circumstance, and when the motion is denied by the court, the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 3 or from a trial court's failure to rule on that motion in the time prescribed by Section 5.

(c) – An interlocutory appeal under Subsection (a), stays the commencement of a trial and all other proceedings in the trial court pending resolution of the appeal.

Section 9. {Damages and Costs}

(a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Section 10. {Exemptions}

(a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

Section 11. {Construction}

(a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Section 12. {Severability Clause}

Section 13. {Repealer Clause}

Section 14. {Effective Date}

This Act shall be effective as to any civil suit for damages commenced on or after the date of enactment of the Act regardless of whether the claim arose prior to the date of enactment.

Summary of the Citizen Participation Act

During the 2011 Session of the Texas legislature, Texas joined 28 other states and the District of Columbia in adopting an Anti-SLAPP[1] statute aimed at providing a mechanism for early dismissal of meritless lawsuits brought against those who exercise their free speech rights. This model bill is based on the law passed in Texas.

The 2011 Texas Anti-SLAPP statute, and its subsequent 2013 amendment, is one of the strongest in the nation. The statute allows a judge to dismiss meritless lawsuits (including claims and counterclaims) filed against one who speaks out about a "matter of public concern" (which is defined expansively) within the first 60-90 days after the case was filed.[2] Once an Anti-SLAPP motion is filed, discovery is stayed unless there is a showing of good cause and the judge orders discovery, but it is still limited to what is necessary to address the motion.

In order to obtain a dismissal under the proposed model bill, one must establish, by a preponderance of the evidence, that the lawsuit was filed in response to the exercise of one's First Amendment rights. Then, the burden shifts to the plaintiff to establish, by clear and specific evidence, that they have support for each essential element of their claim. In addition, the court can dismiss the case, if the moving party establishes a valid defense to the claim.

If the Anti-SLAPP motion is denied, one can file an immediate interlocutory appeal which is to be handled on an expedited basis and during which the entire underlying proceeding is stayed.

Finally, there is a mandatory fee shifting provision if an Anti-SLAPP motion is granted so the person or entity wrongfully filing a lawsuit must pay the defense costs. There is also a discretionary fee award if the court finds the Anti-SLAPP motion was frivolous or brought solely for the purpose of delay.

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[1] The acronym "SLAPP" stands for "Strategic Lawsuit Against Public Participation" and is a lawsuit aimed at those people who are speaking out about matters of public concern, petitioning their government for redress of grievances or exercising their First Amendment right of association.

[2] There are a few exemptions: for enforcement actions brought by the State or law enforcement, for commercial speech, the sale of insurance products or services and for wrongful death and bodily injury lawsuits. The statute also does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

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Punitive Damages Standards Act

Summary

The Punitive Damages Standards Act establishes a standard for liability for punitive damages, raises the burden of proof to clear and convincing evidence, allows a bifurcated trial on the question of whether the defendant is liable for punitive damages, limits the amount of a punitive damages award to twice the amount of the plaintiff's actual compensatory damages, limits vicarious liability for punitive damages, and precludes imposition of punitive damages when a product or service ~~is~~ was approved by a government agency or ~~in~~ complies~~ance~~ with government regulations. Because the laws governing punitive damages vary ~~so much~~ among the states, a legislator planning to introduce a punitive damages bill should first obtain information about his or her state's laws~~ governing punitive damages~~.

Model Legislation

Section 1. {Title}

This Act shall be known and may be cited as the Punitive Damages Standards Act.

~~**Section 2. {Legislative Finding}**~~

~~The legislature finds and declares that:~~

~~(A) The specter of unlimited punitive damages encourages plaintiffs and defendants to try cases needlessly and frustrates early settlement, thereby delaying justice and impeding the swift award of compensatory damages to victims;~~

~~(B) Reasonable and fair standards will promote predictability in the award of punitive damages in a manner fully consistent with the objective of deterrence;~~

~~(C) Private enterprise has been hampered unduly by the threat of unreasonable punitive damages awards, with the consumer paying the ultimate costs in higher prices and insurance costs;~~

~~(D) Punitive damages are private punishments in the nature of fines awarded in civil cases;~~

~~(E) When warranted in egregious cases, punitive damages can provide an appropriate expression of public disapproval for conduct that is truly shocking;~~

~~(F) Current procedures for the award of punitive damages do not properly protect those accused of serious wrongdoing nor provide sufficient guidance for the imposition of these penalties; and~~

~~(G) It is in the public interest to strike a balance between deterring egregious misconduct and encouraging reasonable activity.~~

Section 2~~3~~. {Definitions}

For the purposes of this Act, the meaning of the terms specified shall be as follows:

(A) "Clear and convincing evidence" means evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence, but less than beyond a reasonable doubt.

(B) "Compensatory damages" means damages intended to make good the loss of an injured party and no more. The term includes general and special damages and does not include nominal, exemplary or punitive damages.

~~(C) "Defendant" means any party against whom punitive damages are sought.~~

(~~D~~C) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible serious injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in tangible serious injury.

(~~E~~D) "Nominal damages" are damages that are not designed to compensate a plaintiff and are less than $500.

~~(F) "Plaintiff" means any plaintiff claiming punitive damages.~~

(~~G~~E) "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce.

(~~H~~F) "Punitive damages" includes exemplary or vindictive damages and means damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future. Punitive damages do not include compensatory damages or nominal damages.

(~~I~~G) "Service" means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from manufacture or sale of a product and that are regulated, approved, or licensed by a government agency. Services include, but are not limited to financial services and the provision of insurance.

Section 3. {Pleading Punitive Damages~~; Pre-Suit Notice~~}

(A) An award of punitive damages must be specifically prayed for in the complaint.

~~(B) The plaintiff must specifically plead either:~~

~~(1) That at least 30 days in advance of filing the complaint, that the plaintiff has given notice of seeking damages pursuant to this Act and that in good faith a reasonable settlement could not be reached; or~~

~~(2) That such 30 days notice under this section could not be given because of exigent circumstances.~~

(~~C~~B) The plaintiff shall not specifically plead an amount of punitive damages, only that such damages are sought in the action.

(~~D~~C) The prayer for punitive damages shall be stricken prior to trial by the court, unless the plaintiff presents prima facie evidence sufficient to sustain an award of punitive damages under this Act to the court at least 30 days prior to trial.

Section ~~5~~4. {Procedure for Award of Punitive Damages}

(A) All actions tried before a jury involving punitive damages shall, if requested by any defendant, be conducted in a bifurcated trial before the same jury.

(B) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage.

(C) Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.

(D) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages.

(E) Evidence of a defendant's financial condition or net worth is not admissible in the proceedings on punitive damages.

(F) In determining the amount of punitive damages, the trier of fact shall consider, to the extent relevant, ~~all relevant evidence, including~~ the following:

(1) The ~~level~~nature and ~~of~~ reprehensibility of the defendant's ~~conduct~~wrongdoing;

(~~1~~2) The severity of the harm suffered by the plaintiff as a result of the ~~caused by the~~ defendant's conduct, including whether the harm was physical rather than economic in nature;

(~~2~~3) The extent to which the plaintiff's own conduct contributed to the harm;

(~~3~~4) The duration of the conduct, the defendant's awareness, and any concealment by the defendant;

(~~4~~5) The profitability of the conduct to the defendant;

~~(5) Awards of compensatory and punitive damages to persons similarly situated to the plaintiff;~~
(6) Whether previous judgments or settlements in cases involving the same or different parties and the same conduct or course of conduct that is involved in the present claim have resulted in awards of punitive damages, payment of damages in lieu of future punitive damages, or waivers of the right to recover punitive damages, such that an award of punitive damage in the present case would result in duplicative or excessive punishment;

~~(6) Prospective awards of compensatory damages to persons similarly situated to the plaintiff;~~(7) Whether an award of punitive damages in the present case would potentially impair the ability of successful plaintiffs in other pending cases to obtain satisfaction of any award of compensatory damages that might be made in the favor of the claimants in those pending cases.

(8) Any criminal penalties imposed on the defendant as a result of the conduct complained of by the plaintiff; and

(9) The amount of any civil fines assessed against the defendant as a result of the conduct complained of by the plaintiff.

~~(G) In determining the amount of punitive damages, the trier of fact shall not consider the wealth or financial condition of the defendant, but such evidence may be considered by the trial and appellate courts in determining whether the award is excessive.~~

(~~H~~G) If a verdict is rendered awarding punitive damages, the trial court shall carefully review the decision of the trier of fact, considering all relevant evidence, including the factors identified in paragraph ~~5~~F above, to ensure that the award does not exceed an amount necessary for the sake of example and to punish the defendant. Trial courts are to reflect in the record their reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of damages.

(~~I~~H) The amount of punitive damages shall be reduced pursuant to the contributory or comparative fault principles of the law of this state. In any action in which there are two or more defendants, an award of punitive damages must be specific as to each defendant, and each defendant is liable only for the amount of the award made against that defendant.

Section ~~6~~5. {Proof Required for Award of Punitive Damages}

Punitive damages may only be awarded if the plaintiff proves by clear and convincing evidence that his or her harm was the result of actual malice. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

Section ~~7~~6. {Ceiling for Punitive Damages Award}

(A) No award of punitive damages shall exceed two times the amount of the plaintiff's actual ~~plaintiff's~~ compensatory damages ~~award~~ or ~~$250,000~~ [SET $ AMOUNT], whichever is greater. If the defendant is an individual or a business with 50 or fewer full-time employees, no award of punitive damages shall exceed two times the amount of the plaintiff's actual compensatory damages or ~~$250,000~~ [SET $ AMOUNT], whichever is less.

(B) Awards of judgment interest, attorneys' fees, and civil penalties shall not constitute actual compensatory damages for purposes of determining a punitive damages ratio under this subsection.

Section 7. {Vicarious Liability}

(A) The culpability of a defendant for punitive damages whose liability is alleged to be vicarious shall be determined separately from that of any alleged agent, employee, or representative.

(B) Notwithstanding paragraph (A) of this subsection, punitive damages may be awarded against a defendant based on vicarious liability for the acts or omissions of an agent or employee only if the finder of fact determines by special verdict based on clear and convincing evidence that one or more of the following has occurred:

(1) The act or omission was committed by a person employed in a management capacity while that person was acting within the scope of employment;

(2) The defendant was reckless in hiring, supervising, or training the agent or employee and that recklessness was the proximate cause of the act or omission that caused the loss or injury; or

(3) The defendant authorized, ratified, or approved the act or omission with knowledge or conscious or reckless disregard that the act or omission may result in the loss or injury.

(C) Nothing in this subsection shall be construed to expand or increase the scope of vicarious liability for punitive damages under state law.

(D) For purposes of this subsection, "a person employed in a management capacity" means an employee with authority to set policy and exercise control, discretion, and independent judgment over a significant scope of the employer's business.

~~**Section 8. {Availability of Punitive Damages}**~~

~~Nothing contained in this Act is to be construed as to creating any claim for punitive damages which is not now present under the law of this state.~~

Section 8. {~~FDA Defense~~ Regulatory Compliance}

(A) A defendant shall not be liable for punitive damages if:

(1) The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license or similar determination of a government agency; or

(2) The product was in compliance with a statute of this State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, where such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller.

(3) The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency.

(B) This section shall not apply if the claimant establishes that the defendant at any time before the event that allegedly caused the harm did any of the following:

(1) Sold the product or service after the effective date of an order of a government agency to remove the product from the market, to withdraw its approval of the product or service, or to substantially alter its terms of approval of the product or service in a manner that would have avoided in the claimant's alleged injury; or

(2) Intentionally, and in violation of applicable regulations, withheld from or misrepresented to the government agency information material to the approval or maintaining of approval of the product or service, and such information is relevant to the harm which the claimant allegedly suffered; or

(3) Made an illegal payment to an official or employee of a government agency for the purpose of securing or maintaining approval of the product or service.

~~(A) Punitive damages shall not be awarded if a drug or device or combination device or food or food additive which caused the claimant's harm:~~

~~(1) Was subject to premarket approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat.1040, 21 U.S.C.Sec.301 et seq. or the "Public Health Service Act," 58 Stat.682, 42 U.S.C.Sec.201 et seq. and was approved or licensed; or~~

~~(2) Is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations.~~

~~(B) This exception shall not apply where the plaintiff proves by clear and convincing evidence that the product manufacturer:~~

~~(1) Knowingly and in violation of applicable agency regulations withheld or misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or~~

~~(2) Made an illegal payment to an official of the federal Food and Drug Administration for the purpose of securing approval of the product.~~

Section 9. {Availability of Punitive Damages}

Nothing contained in this Act is to be construed as to creating any claim for punitive damages which is not now present under the law of this state.

Section 10. {Severability Clause}

Section 11. {Repealer Clause}

Section 12. {Effective Date}

This Act shall be effective as to any civil suit for damages commenced on or after the date of enactment of the Act regardless of whether the claim arose prior to the date of enactment.

Originally Approved by the ALEC Board of Directors in 1995.

EXPLANATION OF PROPOSED AMENDMENTS TO THE ALEC MODEL PUNITIVE DAMAGES STANDARDS ACT

Purposes

The proposed amendments to the ALEC Punitive Damage Standards Act are intended to (1) streamline the act by removing nonessential or unused provisions; (2) update its provisions to reflect developments in constitutional law governing punitive damages since the model act's adoption in 1995; (3) clarify that the dollar amount of any limit on punitive damages is a public policy determination for individual state legislatures; (4) eliminate consideration of extra-compensatory damages, such as attorneys' fees and prejudgment interest, that improperly inflate "compensatory damages" with respect to calculating the statutory limit on punitive damages; (5) limit vicarious liability for punitive damages, and (6) replace the existing model act's "FDA defense" with a regulatory compliance provision that is consistent with ALEC's more recently adopted model Regulatory Compliance Congruity with Liability Act.

Section 2. {Legislative Findings}

The proposed amendment would eliminate legislative findings. Legislators may develop findings specific to the public policy of their states.

Section 3. {Definitions}

The proposed amendment eliminates definitions for commonly understood terms (i.e., "plaintiff" and "defendant").

Section 3 {Pleading Punitive Damages; Pre-Suit Notice}

The 1995 version of the model act required a plaintiff to give 30 days pre-suit notice to the defendant of the intent to seek punitive damages, and to state in the complaint that a reasonable settlement could not be reached. The proposed amendment eliminates the pre-suit notice requirement. It does not appear that any state has enacted such a provision.

Section 4. {Procedure for Award of Punitive Damages}

The proposed amendments revise the factors that a fact finder may consider in setting the amount of a punitive damages award. The revised factors reflect constitutional law developments since the model act's 1995 adoption. A proposed amendment adds "the nature and reprehensibility of the defendant's wrongdoing" as the first factor to reflect the Supreme Court's finding that the reprehensibility of the defendant's conduct is considered the "most important indicium of the reasonableness of a punitive damages award." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). ~~A proposed amendment strikes two factors, (5) and (6), which required juries to consider prior awards of compensatory and punitive damages to other people and potential future awards of compensatory damages to persons similarly situated, in determining the amount of a punitive damage award. These factors are inconsistent with Supreme Court precedent. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003), the Court instructed that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." Similarly, the Court has found that trial courts must adequately instruct the jury that it cannot punish the defendant for harm done to others. *See Philip Morris USA v. Williams*, 549 U.S. 346, 356-57 (2007).~~

<u>A proposed amendment revises factors (5) and (6), which require juries to consider prior awards of compensatory and punitive damages to other people and potential future awards of compensatory damages to persons similarly situated, in determining the amount of a punitive damage award. The revisions are intended to clarify the purpose of these provisions. They ensure that the jury considers whether imposing additional punitive damages on a defendant that has already been punished for the same or similar conduct serves a legitimate purpose. The revisions to paragraph (5) recognize multiple awards of punitive damages for the same course of conduct can lead to excessive punishment after the deterrent effect of such awards has already been achieved. In addition, the revisions to paragraph (6) recognize that repeatedly imposing punitive damage awards on a business may provide a windfall to the first individuals to receive judgments at the expense of future plaintiffs with valid claims. Due to the depletion of a defendant's resources on</u>

multiple punitive damage awards that serve no compensatory function, future plaintiffs may not be able to recover for such expenses as medical costs. *See In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000).

A proposed amendment also strikes paragraph (G), which prohibits a jury from hearing evidence of the defendant's wealth, but allows courts to consider such wealth when determining whether a punitive damage award is excessive. Defendants may have divergent views about the introduction of evidence of their financial condition. For example, for larger businesses, wealth evidence may inflate punitive damage awards, while smaller businesses and those in precarious financial condition may wish to educate the jury on the impact that a punitive damage award will have on their continued viability. The use of wealth evidence is addressed in recent Supreme Court opinions. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, ~~at~~ 427 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

Section 6. {Ceiling on Punitive Damage Award}

The 1995 model act recommends that punitive damages should be limited to twice the plaintiffs' compensatory damages or $250,000, whichever is *greater*. With respect to small businesses, the model act recommends a limit of two times the plaintiffs' compensatory damages or $250,000, whichever is *less*. The purpose of this provision is to provide proportionality between the actual harm caused by the defendant's misconduct and the punitive damages award, providing fairer notice to a defendant of the potential penalty.

The proposed amendment makes two changes to this section. First, the proposal would remove the $250,000 amount and does not recommend any particular level for a punitive damage limit. About half of the states have enacted a statutory limit on punitive damages. The amount of the cap varies significantly from state to state. For that reason, the proposed amendment provides no specific recommendation on the amount of the limit, which should be determined based on the public policy preferences of each state.

Second, a proposed amendment would clarify that extra-compensatory awards of judgment interest, attorneys' fees, and civil penalties do not constitute actual compensatory damages for purposes of applying the multiplier to calculate the maximum permissible punitive damage award. Many states have adopted limits on punitive damages that include a multiple of the plaintiff's compensatory damages, as recommended by the model act (typically the greater of one, two, or three times the compensatory award <u>or</u> a maximum dollar amount set by statute).[1] Most state laws, as well as ALEC model act, do not provide clear guidance to courts as to whether a plaintiff's attorneys' fees or judgment interest, when awarded,[2] should be considered "compensatory" for purposes of applying the cap. Courts have reached inconsistent conclusions as to whether such amounts are "compensatory."[3] This is an important issue because adding attorneys' fees or judgment interest to the amount awarded for actual harm may result in exponentially larger punitive damage awards that are not tied to the defendant's conduct.

Judgment interest, attorneys' fees, and civil penalties should not be considered "compensatory" damages.

- Attorneys' fees are not ordinarily recoverable in civil litigation. In some types of cases, legislatures have authorized recovery of litigation expenses for public policy reasons, not to serve compensatory goals. Including attorneys' fees in the amount of compensatory damages will arbitrarily result in higher punitive and treble damage awards in the types of cases in which recovery of legal fees are authorized and lower awards in other cases. As a result, defendants will be punished based on the type of claim the plaintiff asserts, rather than its conduct.

- The amount of judgment interest awarded is largely a function of the length and complexity of a lawsuit. Basing a punitive or treble damage award the amount of time that has passed since the injury or filing of a lawsuit punishes an individual or company for defending itself in court. In addition, the high judgment interest rates applicable in some states – which run as high as ten or even twelve percent[4] -- already include a punitive element. As a result, basing a punitive or treble damage award on judgment interest results in duplicative and excessive punishment.

- Neither attorneys' fees nor judgment interest are determined by the jury when it calculates the plaintiff's damages. Both amounts are determined by a court applying state law that has no tie to the defendant's conduct.

New Section. {Vicarious Liability}

This new section of the model act clarifies that a defendant who is vicariously liable for the acts of another is generally not subject to punitive damages. Under the theory of vicarious liability, employers may have to pay for a plaintiff's injuries for medical bills, lost wages, and pain and suffering if such injuries were caused by an the actions of an employee of the company while on the job. In such situations, the employer may not have directed the employee to act wrongfully, but is deemed liable as a matter of law. Punitive damages, however, are intended to punish a party for especially bad acts, not the wrongful conduct of others.

Under the new section, which is based on a recently enacted Tennessee law,[5] employers who are vicariously liable may have to pay punitive damages only in three instances: (1) if the act was committed by a manager; (2) if the employer knew about the bad act; or (3) if the employer was reckless in hiring, training, or supervising the employee. Other states have adopted similar provisions.[6]

Section 9. {FDA Defense}

The 1995 model act provides that punitive damages are not available in litigation involving a drug, medical device, or food or food additive that is subject to premarket approval or licensure by the U.S. Food and Drug Administration with certain exceptions. For purposes of consistency in ALEC policy, the proposed amendment replaces the "FDA defense" with a provision of the model Regulatory Compliance Congruity with Liability Act that ALEC adopted in 2007 and revised in January 2013. This provision applies to all products and services that are specifically approved by a government agency or in compliance with government standards relevant to the event or risk of harm that occurred. In such situations, a defendant remains subject to punitive damages if it sold a product or service after a government-ordered recall or withdrawal of approval, intentionally withheld or misrepresented information to the agency to secure or maintain approval of the product or service, or made an illegal payment to a government official to secure or maintain approval of the product or service. Several states have adopted similar provisions.[7] This provision incorporates the fundamental principle that a business should not be punished when it follows the law.

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1 *See, e.g.*, Ala. Code § 6-11-21; Alaska Stat. § 09.17.020; Colo. Rev. Stat. § 13-21-102; Fla. Stat. Ann. § 768.73; Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Mo. Rev. Stat. § 510.265; Nev. Rev. Stat. Ann. § 42.005; N.J. Stat. Ann. § 2A:15-5.14; N.C. Code § 1D-25; N.D. Cent. Code § 32-03.2-11(4); Ohio Rev. Code Ann. § 2315.21; Okla. Stat. Ann. tit. 23, § 9.1 ; S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104; Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Wis. Stat. Ann. § 895.043(6); *see also* Conn. Gen. Stat. Ann. § 52-240b (limiting punitive damages to "twice the damages awarded" in product liability cases); 40 Pa. Cons. Stat. Ann. § 1303.505 (limiting punitive damages to two times compensatory damages in cases against healthcare providers).

2 An estimated 200 federal statutes and close to 2,000 state laws permit or require a losing party to pay a prevailing party's attorneys' fees and costs. *See* David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and the "English Rule,"* 15 Ind. Int'l & Comp. L. Rev. 583, 588 (2005). Determination of judgment interest varies significantly from state to state.

3 Courts have reached inconsistent conclusions as to whether such amounts are "compensatory." For example, several Texas appellate courts have properly recognized that prejudgment interest is *not* part of actual damage award upon which a punitive damages cap may be calculated. *See Wheelways Ins. Co. v. Hodges*, 872 S.W.2d 776, 783 n.8 (Tex. Ct. App. 1994); *see also I–Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 841 (Tex. Ct. App. 1995) (discussing *Wheelways* finding with approval); *Mobil Oil Corp. v. Ellender*, 934 S.W.2d 439 (Tex. Ct. App. 1996) (agreeing with *Wheelways*), *aff'd in part and rev'd in part on other grounds*, 968 S.W.2d 917 (Tex. 1998). More recently, the Missouri Supreme Court ruled that its statute limiting punitive damages to five times the "net amount of the judgment" includes the attorneys' fees awarded to a plaintiff in a disability discrimination action. *See Hervey v. Missouri Dept. of Corrections*, 379 S.W.3d 156, 165 (Mo. 2012) (en banc) (sustaining a $1.3 million punitive damage award by including in the "net amount of the judgment" nearly $100,000 in attorney's fees in addition to $127,056 in actual damages and $36,288 front pay award). In that instance, by including prejudgment interest, the court was able to affirm a punitive damage award that was about $500,000 larger under the statutory cap than would otherwise be permissible.

4 *See, e.g.*, Cal. Civ. Code §§ 3287 to 3291; Haw. Rev. Stat. § 478-2; Mass. Gen. Laws Ch. 231 §§ 6B, 6C; Minn. Stat. § 549.09(c)(2); Mont. Code Ann. § 25-9-205; N.M. Stat. § 56-8-4; R.I. Gen. Laws § 9-21-10; S.D. Codified Laws § 21-1-13.1; Tenn. Code Ann. §§ 47-14-121 to 123; Wis. Stat. §§ 807.01(4), 814.04(4), 815.05(8).

5 S.B. 222 (Tenn. 2013) (codified at Tenn. Code Ann. § 29-39-104(g)(1)).

6 *See, e.g.,* Cal. Civ. Code § 3294(b) ("An employer shall not be liable for [punitive damages] based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.").

7 *See, e.g.,* Ariz. Rev. Stat. § 12-689; Tenn. Code Ann. § 29-39-104(e).

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Model Act on Private Enforcement of Consumer Protection Statutes

Summary

State consumer protection statutes, frequently known as "unfair and deceptive trade practices acts," vary widely from state to state. ALEC's Model Act on Private Enforcement of Consumer Protection Statutes structures the private right of action under such laws to reflect sound public policy. Legislation based on the model act must be carefully drafted to fit within the state's existing statutory scheme. Cross-references to the state's existing definition of an unlawful act or practice, optional language, and language that may be altered to fit the preference of the sponsor or consistency with state law are presented in brackets.

Model Legislation

Section 1. Private Right of Action.

(a) A person who reasonably relies upon an act or practice declared unlawful by [SECTION] in entering into a transaction and thereby suffers an ascertainable loss of money or property may bring an action under this Act to enjoin further violations, or to recover as damages the out-of-pocket loss the person sustained as a result of such act or practice, or both. The "out-of-pocket loss" shall be no more than the difference between what the person paid for the product or service and what the product or service was actually worth in the absence of the unlawful act or practice.

(b) At least ten days prior to the commencement of any action brought under this section, any person intending to bring such an action shall notify the prospective defendant of the intended action, and give the prospective defendant an opportunity to confer with the person, the person's counsel, or other representative as to the proposed action. Such notice shall be given to the prospective defendant by mail, postage prepaid, to the prospective defendant's usual place of business, or if the prospective defendant has no usual place of business, to the prospective defendant's last known address.

IN STATES PROVIDING FOR AND OPTING TO MAINTAIN TREBLE DAMAGES, INCLUDE PARAGRAPHS (c) AND (d):

(c) If the [court OR trier of fact] finds by clear and convincing evidence that the use or employment of the act or practice declared unlawful by [SECTION] was willful with the purpose of deceiving the public, the court may award up to three (3) times the actual damages sustained[, or $500 per person, whichever is greater]. "Actual damages" means the out-of-pocket loss the

person sustained as a result of the unlawful act or practice and does not include judgment interest, attorneys' fees, or civil penalties.

(d) In determining whether to award enhanced damages under Subsection (b) and the amount of such penalty, the [court OR trier of fact] shall consider:

(1) if the amount of the actual damages awarded would have a deterrent effect upon the defendant;
(2) the seriousness of the violation, including the nature, circumstances, frequency, and gravity of any prohibited act or practice;
(3) the history of previous violations;
(4) the good faith of the person found to have violated the Act, including whether the person took prompt and appropriate remedial action upon learning of the alleged violation; and
(5) any other matter that justice may require.

(e) Any person who is entitled to bring an action under Subsection (a) on his or her own behalf against an alleged violator of this act for damages for an act or practice declared unlawful by [SECTION] may bring a class action against such person on behalf of any class of persons of which he or she is a member and which has been damaged by such act or practice, subject to and pursuant to the [STATE] Rules of Civil Procedure governing class actions. [In any such class action, the court shall not award statutory damages, but recovery shall be limited to actual out-of-pocket loss suffered by the person or persons.][1] This paragraph is not intended to create or otherwise permit class action relief where not permitted by state law.[2]

(f) Punitive or exemplary damages are not permitted in an action maintained under this Section.

Section 2. Attorneys Fees and Costs.

The court may award reasonable attorneys' fees and costs to:

(a) A prevailing plaintiff upon a finding [by the court OR trier of fact] that the defendant's use or employment of the act or practice declared unlawful by [SECTION] was willful with the purpose of deceiving the public;

(b) A prevailing defendant upon a finding by the court that the action was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment.

Section 3. Limitation of Actions.

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1 This provision is needed only in states that opt to provide statutory damages, a minimum award to the plaintiff regardless of the actual injury. The model act does not provide for statutory damages, but fully compensates plaintiffs for any out-of-pocket loss.

2 Legislation in states that do not currently permit class action lawsuits under their consumer protection statute should *not* include paragraph (e).

No action may be brought more than one (1) year after the person bringing the action discovers or reasonably should have discovered a loss resulting from an act or practice declared unlawful by [SECTION], but in no event may any action be brought under this chapter more than [four (4)] years from the first instance of the act or practice giving rise to the cause of action.

Section 4. Exemptions.

(a) Nothing in this Act shall apply to:

(1) Acts or practices required or permitted by or in accord with state or federal law, rule or regulation, judicial or administrative decision, or formal or informal agency action;
(2) Acts or practices by the publisher, owner, agent or employee of a newspaper, periodical, radio or television station or any other person without knowledge of the deceptive character of the advertisement in the publication or dissemination of an advertisement supplied by another; or
(3) Acts or practices by a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated the Act.

[(b) Nothing in this Act is intended to create a claim or remedy for a violation of a state or federal law, rule or regulation where the legislature did not establish a private right of action.][3]

Originally passed by the Civil Justice Task Force in August of 2005 and passed by the ALEC Board of Directors in September of 2005.

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[3] This language is needed in states in which courts have permitted use of consumer protection statutes to effectively create private rights of action under other statutes or regulations where the legislature did not intend to allow private lawsuits.

EXPLANATION OF PROPOSED AMENDMENT TO ALEC MODEL ACT ON PRIVATE ENFORCEMENT OF CONSUMER PROTECTION STATUTES

Background

States have enacted consumer protection laws that broadly prohibit unfair and deceptive trade practices. Several states permit plaintiffs to seek treble (triple) damages.[1] ALEC's **Model Act on Private Enforcement of Consumer Protection Statutes** provides that where states have taken this path, treble damage awards should be reserved for cases in which there is clear and convincing evidence that a business willfully engaged in an unfair or deceptive trade practice with the purpose of deceiving the public.

The Issue

The model act, and some state consumer protection statutes, does not clearly define the amount of damages that may be trebled. Some plaintiffs' lawyers have asked that courts include amounts such as prejudgment interest or their attorneys' fees (which are often recoverable by prevailing plaintiffs under state consumer protection laws) as "actual damages" subject to trebling. Courts have reached inconsistent results in addressing this issue.[2]

This is an important issue because adding attorneys' fees or judgment interest to the amount awarded for actual harm may result in exponentially larger punitive damage awards that are not tied to the defendant's actions. In cases involving small amounts of damages, such as consumer claims, the plaintiff's attorney fees may substantially exceed his or her loss.

The Proposed Amendment

The proposed amendment clarifies that "actual damages" do not include judgment interest or attorneys' fees. It would add the following text to Section 1(c) {Private Right of Action}:

> "Actual damages" means the out-of-pocket loss the person sustained as a result of the unlawful act or practice and does not include judgment interest, attorneys' fees, or civil penalties.

Explanation

Judgment interest, attorneys' fees, and civil penalties should not be considered "compensatory" damages.

- Attorneys' fees are not ordinarily recoverable in civil litigation. In some types of cases, legislatures have authorized recovery of litigation expenses for public policy reasons, not to serve compensatory goals. Including attorneys' fees in the amount of compensatory damages will arbitrarily result in higher punitive and treble damage awards in the types of cases in which recovery of legal fees are authorized and lower awards in other cases. As a result, defendants will be punished based on the type of claim the plaintiff asserts, rather than its conduct.

- The amount of judgment interest awarded is largely a function of the length and complexity of a lawsuit. Basing a punitive or treble damage award the amount of time that has passed since the injury or filing of a lawsuit punishes an individual or company for defending itself in court. In addition, the high judgment interest rates applicable in some states – which run as high as ten or even twelve percent[3] -- already

include a punitive element. As a result, basing a punitive or treble damage award on judgment interest results in duplicative and excessive punishment.

- Neither attorneys' fees nor judgment interest are determined by the jury when it calculates the plaintiff's damages. Both amounts are determined by a court applying state law that has no tie to the defendant's conduct.

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1 Some state consumer laws authorize treble damages if the jury finds that the defendant acted intentionally, willfully, knowingly, with notice, or in bad faith. *See, e.g.*, Colo. Rev. Stat. § 6-1-113(2)(a)(III); Ga. Code Ann. § 10-1-399(c); La. Rev. Stat. Ann. § 51:1409(A); Mass. Gen. Laws ch. 93A, § 9(3); N.H. Rev. Stat. Ann. § 358-A:10 N.M. Stat. Ann. § 57-12-10(B); Ohio Rev. Code Ann. § 1345.09(B); S.C. Code Ann. § 39-5-140(a); Tenn. Code Ann. § 47-18-109(a)(3); Va. Code Ann. § 59.1-204(A); Tex. Bus. & Com. Code Ann. § 17.50(b)(1). Other states award three times actual damages, and Wisconsin awards two times actual damages, to every prevailing plaintiff in a consumer protection lawsuit. *See, e.g.*, Alaska Stat. § 45.50.531(A); D.C. Code Ann. § 28-3905(K); Haw. Rev. Stat. Ann. § 480-13; N.J. Stat. Ann. § 56:8-19; N.C. Gen. Stat. § 75-16; Wis. Stat. § 100.20(5).

2 For example, some Texas appellate courts have trebled prejudgment interest as "actual damages," while others have not. *See, e.g.*, *Paramore v. Nehring*, 792 S.W.2d 210, 211-12 (Tex. Ct. App. 1990) (permitting trebling of prejudgment interest and citing cases from other Texas appellate courts that have allowed trebling and several appellate courts that found prejudgment interest is not "actual damages" and should, therefore, not be trebled). The Texas Supreme Court has not resolved this split. *See, e.g., Celtic Life Ins. Co. v.* Coats, 885 S.W.2d 96, 100 n.6 (Tex. 1994) (explicitly not reaching the issue of "whether the courts below erred in awarding trebled prejudgment interest").

3 *See, e.g.*, Cal. Civ. Code §§ 3287 to 3291; Haw. Rev. Stat. § 478-2; Mass. Gen. Laws Ch. 231 §§ 6B, 6C; Minn. Stat. § 549.09(c)(2); Mont. Code Ann. § 25-9-205; N.M. Stat. § 56-8-4; R.I. Gen. Laws § 9-21-10; S.D. Codified Laws § 21-1-13.1; Tenn. Code Ann. §§ 47-14-121 to 123; Wis. Stat. §§ 807.01(4), 814.04(4), 815.05(8).

Civil Justice Task Force Meeting
Speaker Bios

Keltie Peay, Redgrave LLP

Keltie Peay has spent the majority of her career providing advice and counsel for white-collar criminal defense and complex civil litigation cases in both state and federal courts. Her pretrial and trial experience include conducting investigations, deposing witnesses, drafting and arguing motions and responses, conducting mock trials and focus groups, participating in settlement negotiations, preparing clients for and representing clients at proffers, and participating in jury trials.

As an Attorney with Redgrave LLP, Keltie contributes to prophylactic discovery strategy, enabling clients to better prepare for and respond to information law issues with speed and efficiency. She is also involved in both project and case-specific work associated with information governance, eDiscovery, data privacy, and records management matters. Notably, she helps Redgrave LLP teams provide advice and counsel to companies facing eDiscovery issues in connection with criminal and civil investigations.

Prior to joining Redgrave, Keltie worked as a Litigation Associate at Neal and Harwell in Nashville, Tennessee. Keltie also worked as a Law Clerk for the Hon. Melvin Brunetti (U.S. Circuit Judge, Ninth Circuit Court of Appeals) and the Hon. Jackson Kiser (Chief Judge, U.S. District Court for the Western District of Virginia).

Keltie received her J.D. from the University of Virginia School of Law where she served on the Editorial Board of the Virginia Law Review. She received a B.A. from Harvard College.

Phil Goldberg, Shook Hardy & Bacon, LLP

Phil Goldberg, a partner in SHB's Washington, D.C.-based Public Policy Group, counsels clients on liability-related public policy, public affairs and public relations issues. Instead of in-court advocacy, he helps clients address important litigation issues outside of the courtroom. Often, these issues affect numerous or high-profile cases, or involve potential expansions of liability based on novel legal theories. In this regard, Phil often works closely with litigation teams, whether at SHB, at other firms or through in-house counsel.

Phil focuses his practice on three areas:

Common Law in the Courts: Advancing the proper development of tort law through writing amicus briefs for national business associations, speaking at judicial and attorney conferences, and authoring legal scholarship.

Federal and State Legislation: Seeking legislative solutions, when and as appropriate, by developing comprehensive legislative strategies, testifying on legislation, preparing easy-to-understand advocacy materials, and building industry coalitions.

Crisis and Litigation Communications: Solving crisis and litigation communication challenges by providing strategic counsel in concert with a client's existing or potential litigation goals, writing materials that help non-lawyers understand legal issues, and briefing reporters to help assure more accurate coverage of client litigation.

Substantively, Phil specializes in the proper development of tort and product liability law. He has worked extensively on public nuisance theory, international biotechnology liability policy, climate change tort litigation, liability in asbestos cases, curbing abusive patent "trolls," and damages in animal injury claims.

With respect to public nuisance theory, Phil has been a leading voice for maintaining the traditional boundaries of the tort and not allowing it to become a catch-all theory of liability. He has authored several articles explaining that public nuisance does not, for example, circumvent product liability law or subject anyone to liability for "causing" global climate change. He also authored amici briefs submitted to the Supreme Court of the United States in the 2011 climate change case Connecticut v. AEP and the Supreme Court of Rhode Island in Rhode Island v. Lead Industries Association. The Supreme Courts of Rhode Island and New Jersey have cited Phil's articles.

Internationally, Phil has worked extensively on liability policy for crop biotechnology. As counsel to Croplife International, he helped develop the "Compact," which is a mechanism for any country to arbitrate a claim that crop biotechnology has harmed biological diversity within its jurisdiction. In addition to assisting with drafting the Compact, Phil engaged in dialogues with representatives from key governments and international bodies to enhance their understanding of the Compact, incorporate their feedback, and help them gain comfort that the Compact is a fair, viable mechanism for resolving disputes. Phil continues to work with Croplife International to implement the Compact and has co-authored an upcoming chapter of a book on international liability and redress for biotechnology.

Through this work, Phil has developed a specialty for communicating complex business legal issues in ways that appeal to mainstream and lay audiences. He also handles "Fast Track" recalls for clients who manufacturer consumer products and focuses on policies affecting public access to information in high-profile litigation, including leaks of confidential materials, media shield laws, and attorney-client privilege with public relations firms.

Phil is a member of the American Law Institute, which publishes the Restatements of the Law for torts, product liability and other areas of law related to his practice. He serves as the Administrative Partner for SHB's Washington office and received his firm's Mosaic Award for his commitment to diversity in the legal profession.

Before joining SHB, Phil spent eight years as an aide to three Democratic members of Congress and three years as a vice president of litigation communications for two leading public relations firms. He received his law degree from George Washington University Law School, where he was Order of the Coif, and his Bachelor of Arts, cum laude, from Tufts University. He resides in Bethesda, Maryland, with his wife, three kids and their fun and energetic dog, Riley.

Mark Behrens, Shook Hardy & Bacon, LLP

Mark Behrens co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. For over two decades, Mark has been extensively involved in liability law, defense litigation, civil justice reform, and counseling in the prevention of liability exposure. He is a member of The American Law Institute (ALI) and was recently invited to serve as an Adviser to the ALI's Restatement Third, Torts: Intentional Torts to Persons project. Mark is a Martindale-Hubbell AV Preeminent Rated attorney. He has served on the adjunct faculty of The American University's Washington College of Law. In the fall of 2010, Mark taught Advanced Torts as a Distinguished Visiting Practitioner in Residence at Pepperdine University School of Law in California.

Mark has been listed as one of Washington, D.C.'s "top lawyers" by Washingtonian magazine and as a leading product liability defense attorney by Who's Who Legal: The International Who's Who of Business Lawyers. He has authored or coauthored over 149 amicus briefs on behalf of national and state business and civil justice organizations in cases before the United States Supreme Court, seven different federal circuit courts of appeal, 30 different state courts of last resort, and seven different state appellate courts. He has also testified before Congress and numerous state legislatures. He has served as an expert witness in trials.

He has published over 50 scholarly articles in leading national journals and law reviews, including the Harvard Journal on Legislation, Cornell Journal of Law and Public Policy, and Texas Review of Law & Politics. He is a recipient of a Burton Award for Legal Achievement and received an award from several national organizations for major research contributing to civil justice issues. Mark has been quoted in The Washington Post, The Wall Street Journal, The New York Times, and the National Law Journal, and has appeared on radio and television, including CNBC, MSNBC, Bloomberg, and CNN.

Mark is counsel to the Coalition for Litigation Justice; Adviser to the American Legislative Exchange Council's Civil Justice Task Force; co-counsel to the American Tort Reform Association; and co-chair of the Tort and Product Liability Subcommittee of the Federalist Society's Litigation Practice Group. He is also a member of the Washington Legal Foundation's Legal Policy Advisory Board, NFIB Small Business Legal Center's Advisory Board, the Product Liability Advisory Council, Inc., Lawyers for Civil Justice, and the Lawyers Committee of the National Center for State Courts.

Mark received his J.D. in 1990 from Vanderbilt University Law School, where he was a member of the Vanderbilt Law Review and received an American Jurisprudence Award for achievement in tort law. He received his B.A. in Economics from the University of Wisconsin-Madison in 1987.

Cary Silverman, Shook Hardy & Bacon, LLP

Cary's public policy work focuses on product liability, tort and consumer law, and civil justice reform. He regularly authors amicus briefs on behalf of national business, trade, and other advocacy groups in cases before the U.S. Supreme Court and state high courts. Cary testifies before state legislatures around the

country on a wide range of issues and assists clients with complex legislative and regulatory matters. He has represented clients and testified before the Consumer Product Safety Commission.

Cary has published numerous articles in prominent law journals. His most recent scholarship addresses federal preemption of tort law claims, consumer litigation, punitive damages, and standards for admission of expert testimony. He has also published extensively on such issues as jury service improvement and judicial selection. In 2009, Cary was recognized with a Burton Award for Excellence in Legal Writing.

Cary has a strong commitment to pro bono service. An active member of the firm's Pro Bono Committee, Cary coordinates pro bono work in the firm's D.C. office. He has represented a Guantanamo detainee, handled landlord-tenant and employment matters, and provided counsel to several nonprofit organizations. Cary is a recipient of the firm's William G. Zimmerman Award in recognition of his sustained commitment to pro bono legal services. An active member of the community, Cary has served as president of local neighborhood associations and as an elected advisory neighborhood commissioner, a non-partisan government official in the District of Columbia.

While completing a dual degree in law and public administration at George Washington University, Cary was managing editor of The Environmental Lawyer and a member of the Moot Court Board. During college, he was elected both president of his class and of the student government.

TIMELINE FOR ACTION ON PROPOSED FRCP AMENDMENTS

The Advisory Committee on Civil Rules is currently considering amendments to Federal Rules of Civil Procedure 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55 and 84. Based on comments from the bench, bar, and general public, the Advisory Committee may then choose to discard, revise, or transmit the amendment as contemplated to the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee"). The Standing Committee independently reviews the findings of the Advisory Committee and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, officially promulgates the revised rules by order, to take effect no earlier than December 1 of the same year (anticipated 2015) unless Congress enacts legislation to reject, modify, or defer the pending rules.

The text of the proposed rules amendments and the accompanying Committee Notes can be found at the United States Federal Courts' website:

http://www.uscourts.gov/rulesandpolicies/rules.aspx/

Any interested party may submit written comments or suggestions on the proposed amendments, and/or may request permission to testify at one of the public hearings on the amendments held by the Advisory Committee. The first public hearing on the amendments was November 7, 2013 in Washington D.C. There are two additional hearings scheduled:

- **January 9, 2014** in Phoenix, Arizona
- **February 7, 2014** in Dallas, Texas

Those wishing to testify in person should contact the Secretary of the Committee in writing ***at least 30 days*** before the hearing. (Address: Jonathan C. Rose, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, Washington, DC 20544.)

All written comments and suggestions must be submitted no later than **February 15, 2014**. Written comments can be submitted electronically, following the instructions provided at:

http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of

discovery need not be admissible in evidence to be discoverable. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) ***Limitations on Frequency and Extent.***

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order <u>under Federal Rule of Evidence 502</u>;

* * * * *

Committee Note

The scope of discovery is changed in several ways. Rule 26(b)(1) is revised to limit the scope of discovery to what is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii). Although the considerations are familiar, and have measured the court's duty to limit the frequency or extent of discovery, the change incorporates them into the scope of discovery that must be observed by the parties without court order.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the

action. Proportional discovery relevant to any party's claim or defense suffices. Such discovery may support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears reasonably calculated to lead to the discovery of admissible evidence is also amended. Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery. Hearsay is a common illustration. The qualifying phrase — "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" — is omitted. Discovery of inadmissible information is limited to matter that is otherwise within the scope of discovery, namely that which is relevant to a party's claim or defense and proportional to the needs of the case. The discovery of inadmissible evidence should not extend beyond the permissible scope of discovery simply because it is "reasonably calculated" to lead to the discovery of admissible evidence.

Rule 26(b)(2)(A) is revised to reflect the addition of presumptive limits on the number of requests for admission under Rule 36. The court may alter these limits just as it may alter the presumptive limits set by Rules 30, 31, and 33.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~**(e) Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

<u>**(e) Failure to Preserve Discoverable Information.**</u>

<u>(1) *Curative measures; sanctions.* If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may:</u>

<u>(A) permit additional discovery, order curative measures, or order the party</u>

to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

(2) ***Factors to be considered in assessing a party's conduct.*** The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable,

and whether the person who made it and the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

* * * * *

Committee Note

In 2006, Rule 37(e) was added to provide protection against sanctions for loss of electronically stored information under certain limited circumstances, but preservation problems have nonetheless increased. The Committee has been repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty

about the obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that might be preserved has heightened these concerns. Significant divergences among federal courts across the country have meant that potential parties cannot determine what preservation standards they will have to satisfy to avoid sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, and applying them to all discoverable information, not just electronically stored information. The amended rule is not limited, as is the current rule, to information lost due to "the routine, good-faith operation of an electronic information system." The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh in calibrating its response to the loss of information.

Amended Rule 37(e) supersedes the current rule because it provides protection for any conduct that would be protected under the current rule. The current rule

provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The routine good faith operation of an electronic information system should be respected under the amended rule. As under the current rule, the prospect of litigation may call for altering that routine operation. And the prohibition of sanctions in the amended rule means that any loss of data that would be insulated against sanctions under the current rule would also be protected under the amended rule.

Amended Rule 37(e) applies to loss of discoverable information "that should have been preserved in the anticipation or conduct of litigation." This preservation obligation was not created by Rule 37(e), but has been recognized by many court decisions. It may in some instances be triggered or clarified by a court order in the case. Rule 37(e)(2) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should have been preserved.

Except in very rare cases in which a party's actions cause the loss of information that irreparably deprives another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith, combined with substantial prejudice.

The amended rule therefore forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). But the rule does not affect the validity of an independent tort claim for relief for spoliation if created by the applicable law. The law of some states authorizes a tort claim for spoliation. The cognizability of such a claim in federal court is governed by the applicable substantive law, not Rule 37(e).

An amendment to Rule 26(f)(3) directs the parties to address preservation issues in their discovery plan, and an amendment to Rule 16(b)(3) recognizes that the court's scheduling order may address preservation. These amendments may prompt early attention to matters also addressed by Rule 37(e).

Subdivision (e)(1)(A). When the court concludes that a party failed to preserve information that should have been preserved in the anticipation or conduct of litigation, it may adopt a variety of measures that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. For example, discovery might be ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not reasonably accessible. More generally, the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis of Rule 26(b)(1) and (2)(C).

In addition to, or instead of, ordering further discovery, the court may order curative measures, such as

Stumping Patent Trolls On The Bridge To Innovation

progressive policy institute • ppi

BY PHIL GOLDBERG

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Shell businesses called Patent Assertion Entities (PAEs) or Non-Practicing Entities (NPEs) game the patent and litigation systems.

President Obama brought much needed attention this June to "patent trolling," a growing area of litigation abuse vexing America's high-tech industries. In these lawsuits, shell businesses called Patent Assertion Entities (PAEs) or Non-Practicing Entities (NPEs)—some of which have been nicknamed "patent trolls"—game the patent and litigation systems.[1] They purchase dormant patents, wait for others to independently develop comparable technology, and assert patent infringement suits. As the President explained, PAEs "don't actually produce anything themselves." Their quest is to "see if they can extort some money" by claiming they own the technology upon which the other companies' products are built.

An attorney who used to defend these claims, Peter Detkin, is generally credited with popularizing the "patent troll" moniker. For software, consumer electronics, retail and the many other companies on the receiving end of these lawsuits, PAEs are reminiscent of the mythical trolls that hide under bridges they did not build, but nevertheless require people to pay them a toll to cross. Patent trolling, it turns out, is a better path to the holy grail than hiding under bridges. An oft-cited economic study pegged the overall impact of PAEs in terms of "lost wealth" at $83 billion per year, with legal costs alone amounting in 2011 to $29 billion, up from $7 billion in 2005.[2] At least fifteen PAEs are now publicly traded companies.[3]

This policy brief seeks to address three questions: what caused this recent and rapid rise in PAE litigation, what can be done to stop it, and what is the role for progressives? First, it identifies the confluence of factors that have come together in the past two decades to create the patent equivalent of a 100-year flood, focusing mostly on the explosion of new, widely used technologies, increasing ambiguity in the boundaries of today's patents, and a litigation system incentivizing "ransom" settlements for even questionable infringement claims.

The brief then examines the adverse impact PAE litigation is having on the development and use of innovation, as well as on traditional patent cases brought by inventors the patent system was created to protect. It discusses the rich history of progressives in leading efforts to stop litigation prospecting, concluding that progressives should be at the forefront of this reform too. It then explores specific

proposals the President, Senators Schumer and Leahy, and others have offered to safeguard the patent system from trolling abuse.

The Conditions for Litigation Abuse Have Existed Since the Beginning of Patents

The exclusive right inventors have to their discoveries for certain periods of time is a constitutional right inscribed in Article I of the United States Constitution.[4] The goal of the American patent system is to encourage inventors to publicly disclose how their inventions work in their patent applications so that others can understand and build off their technologies in an effort to quicken innovation. Inventors seeking to use patented technology during the patent holder's period of exclusivity must license it from that patent holder.

The civil justice system provides patent holders with a strict liability tort to safeguard a patent holder's intellectual property from being misappropriated. In a patent infringement case, the patent holder does not need to prove the infringer knew of the patent or willfully infringed on it, just that the infringer made, used, sold, imported or offered for sale a product that included technology covered by the patent. Remedies include an injunction against the infringer's use of the patented technology, compensation for lost profits from competing against the infringing product, and a reasonable royalty for the infringer's use of the patented invention.

Patent infringement claims from those who do not "practice" their patents is not a new phenomenon. Eli Whitney, the famed inventor of the cotton gin, was among the first to generate proceeds from patent infringement litigation.[5] He did not achieve success in commercializing the cotton gin and spent years suing infringers. One of the first "patent trolls" was probably George Selden, a nineteenth century patent lawyer. Selden filed an automobile engine patent, but was able to delay the issuance of the patent for 16 years so the industry could grow around his unknown pending application. The "trap" worked, and he secured licensing agreements by threatening automobile companies with litigation. The U.S. Court of Appeals conceded that Selden "merely took advantage of the delays which the law permitted him."[6]

This combination of being empowered with a strict liability tort and the ability to manipulate the patent and litigation systems provides the underlying current for patent trolling. Additional factors, though, are often needed to lead to wide scale trolling. Some of them were present after the Civil War, which is when the first major flood of patent infringement cases occurred. There was a rapid proliferation of patents over minute aspects of broadly-adopted technology. For example, there were 647 patents on a corn planter, 378 patents on a corn sheller, and 6,211 on the plow.[7] Also, "patent sharks," as they were called then, brought infringement suits accusing farmers for unwittingly using protected technology.[8] Rather

than fight the claims, farmers often agreed to settle for less than the cost of defending themselves.

Complaints about these "patent sharks" have a familiar ring. One U.S. Senator said that "patent-sharks ... procure an assignment of [a] ... a useless patent, and at once proceed to levy black-mail ... upon any man who has ever manufactured or sold, or even used, the later and valuable invention."[9] The Supreme Court also suggested that a patent shark's practices play on "fears and apprehensions of concealed liens and unknown liabilities" to "lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the art."[10]

Since the 1880s, there have been many others who have found ways to make money gaming the patent and litigation systems.[11] None of these other episodes, though, achieved the massive scale or interruptive force of today's PAE litigation.

Today's Perfect Storm for Patent Litigation

Today's 100-year flood of patent litigation is the result of a perfect storm of three cross winds from the software and consumer electronic boom that started in the 1990s.

The first cross wind is opportunity. According to the U.S. Patent and Trademark Office (PTO), there has been a rapid rise in applications over the past twenty years. Between 2010 and 2012, the PTO received an average of 540,000 applications a year, compared with 340,000 applications per year from 2000 to 2002 and 180,000 applications a year from 1990 to 1992. This has led to a significant rise in the number of patents issued.

According to patent practitioners, patent ambiguity has reached epic proportions in recent years.

Also, today's programs, devices, and machines often incorporate many patented technologies. For example, a smartphone can implicate some 250,000 separate patents.[12] Additionally, many products use overlapping technologies to operate on common platforms, such as Wi-Fi networks, or to conform with industry standards. This convergence of a massive influx of patents, complex products incorporating many technologies, and widespread adoption of standardized protocols and platforms has created seemingly endless opportunities for patent holders to allege that others' products are infringing on their patents.

The second element of the perfect storm is increasing uncertainty over where one patent ends and another begins. Patent infringement is a strict liability tort because, given the fact that patents are publicly available, people are theoretically on notice of what technology is patented. In practice, though, many patents are not well-defined and do not provide adequate notice.

In part, patent applications are inherently ambiguous because applicants intentionally use vague or expansive terms to define what they have invented. Their goal is to claim the broadest property right possible. If an inventor were to file an overly specific patent, where one uses exacting terms to describe only the parame-

ters of a prototype, it could be easy for others to misappropriate that inventor's ideas without infringing on the specific patented design.

Here is an example. Suppose we invent the desk. We could file an application for a patent accurately describing our invention: a horizontal writing surface made of wood supported by four legs. After seeing our patent, people could steal our idea, but make products not covered by our specific claims. They could make the writing surface out of metal, incline the surface a few degrees, or support it with three legs. To guard against this, we would try to use broader language to describe our invention in filing our patent. For example, we might claim a patent for any flat surface used for writing. If a person creates a lap desk with a pillow on one side and a flat writing surface on the other, we could allege infringement. That inventor, though, would argue that a lap desk is not covered by our patent because a lap desk and a free-standing desk are separate technologies. Litigation is the only way to resolve this dispute.

Expansive claiming has been taken to higher levels since 2001, when the United States Court of Appeals for the Federal Circuit, the appellate court specializing in patents, relaxed the standard for when a patent can be invalidated for being so expansive the it becomes indefinite.[13] Before this ruling, terms had to be "plain on their face." Now, a patent can be invalidated for indefiniteness only if its terms are "insolubly ambiguous" and subject to "no narrowing construction."[14] The U.S. Federal Trade Commission (FTC) remarked that as a result of this ruling, along with other factors that are specific to areas of innovation, the "zone of uncertainty" has notably widened over the scope and meaning of many of today's patents.[15]

PAEs thrive on this uncertainty. Neither inventors nor courts are able to readily determine whether a design infringes on existing patents, so PAEs can often find a way to file a credible infringement claim. Before an infringement trial begins, courts will typically hold what are called "Markman hearings" to resolve the ambiguities in a patent. These hearings are helpful, but often come late in the process. As a result, defendants must spend hundreds of thousands dollars (sometimes millions of dollars) in litigation costs just to find out the precise scope and meaning of the patent they are accused of infringing.

Third, the risks and harms resulting from ambiguous patents, and the high cost of clarifying them through litigation are disproportionately borne by defendants. The average defense costs are $1.6 million through discovery and $2.8 million through trial in which $1 million to $25 million is at stake.[16] Beyond its expense, discovery can be invasive for defendants, requiring companies to disclose their trade secrets and other confidential technical and financial information, as well as distracting personnel from their business pursuits.

In contrast, PAEs face little risk in pursuing an infringement claim. Pretrial and discovery costs are asymmetrically borne by defendants, and the costs PAE plaintiffs do incur are generally borne by contingency fee counsel. Also, because they

do not have competing products, PAEs generally face little or no possibility of liability from counterclaims. They also do not face the same risks and costs as operating company defendants with respect to reputational harm, the loss of productivity from employees focusing on litigation rather than their usual jobs, or the substantial costs of managing the risk of a potential injunction halting product sales or the use of technologies essential to competing in the marketplace.

PAEs leverage these asymmetrical costs to their advantage. They often wait until technology is broadly commercialized before claiming infringement, enabling them to threaten litigation against a large pool of potential defendants at a time when the cost and difficulty of switching to an alternative technology is high. They will assert multiple claims to drive up the defendants' costs of discovery and preparing the defense, but drop some of the claims when it comes time for them to prepare for trial. They also often make the same infringement claims against a large number of defendants, accepting low dollar settlements with many of the defendants that can be leveraged against the few who remain for trial. Finally, PAEs use creative damage models to raise the stakes of the litigation, even though the damages alleged are unlikely to be awarded and often have nothing to do with the cost or value of the patented invention.

In short, three cross winds—the opportunity created by the explosion of new patented technologies; substantial uncertainties over the scope, strength and validity of patents; and the high, one-sided costs of litigation—have created a favorable business climate for PAEs. By filing plausible claims raising sufficient risk of loss for defendants, they force companies to choose between expending millions of dollars to litigate the claims or settle for less than the cost of the litigation. Some PAEs may succeed at trial, even when defendants developed their own technology, but most patent assertions are meant to drive settlements.

The Adverse Impact of PAE Litigation on Innovation

The public saw a dramatic demonstration of the impact of PAEs in 2006, when a PAE almost shut down the Blackberry wireless service.[17] A court held that Research in Motion (RIM), which manufactures the Blackberry, infringed on patents from the 1990s owned by NTP, Inc. NTP owned several dozen patents related to enabling mobile users to receive e-mails through wireless networks, but did not commercialize them.[18] In 2000, after several companies marketed wireless email services, NTP alleged that they were all infringing on NTP's patents.

After a jury ruled that RIM's technology infringed on NTP's patents, the court ordered an injunction barring RIM from using this technology. At the time, injunctive relief was a nearly automatic remedy in patent infringement cases. The injunction meant that Blackberry users would no longer be able to send and receive emails, giving NTP enormous negotiating leverage.[19] RIM settled the suit for $612.5 million to have the injunction set aside.

Since this lucrative payday, PAE litigation has mushroomed, now accounting for well over half of all patent cases filed in the United States.[20] The explosion prompted the FTC and Congress to hold hearings over the past year to better understand the scope, causes, and impacts of PAE litigation prospecting. The testimonies presented at these hearings offer compelling accounts of the real-life adverse impacts PAEs are having on today's companies and consumers, in the technology sectors and in other areas of the economy, without countervailing benefits.

PAE litigation has mushroomed, now accounting for well over half of all patent cases filed in the United States.

Barnes & Noble testified about the impact on retailers, who are purchasers of software and other technology. It stated that PAEs have sued the company more than twenty-five times. Even though it has never lost in court, the company has spent "tens of millions of dollars...to defend against these suits."[21] In one case, a PAE sued many retailers claiming it owned the technology used on websites, such as BN.com, for returning search results that do not exactly match the terms a customer enters into the search field. The PAE kept suing more companies even as each suit failed. Barnes & Noble explained its Hobson's choice of "paying extortionate ransoms and settling the claim, or fighting in a judicial system ill equipped to handle baseless patent claims at costs that frequently reach millions of dollars."[22]

Innovator companies told of similar experiences. Microsoft stated that it typically has 60 pending PAE infringement claims, costing it tens of millions of dollars every year to defend.[23] Google, Blackberry, Earthlink and Red Hat submitted joint remarks detailing that their litigation defense costs have gone up 400% since 2005.[24]

Newegg testified that it, like others, "would prefer to prove its non-infringement or invalidate the [PAE's] patent in court," but these defense costs "greatly outweigh[s] the settlement offers."[25] Newegg said that one PAE "was so blunt as to explain to Newegg that it was pricing its settlement offer 'well below the pain level'—i.e., below the price where it may be worthwhile for Newegg to defend instead of settle."[26]

A case against Cisco Systems provided a glimpse into a PAE litigation model.[27] In that case, the PAE sent out more than 8,000 demand letters to potential defendants. Many targets agreed to pre-litigation settlements, and the PAE filed only 26 cases. Statistics show why PAEs want to avoid litigation. Once a case is filed, PAEs receive an award only 23% of the time. When cases go to trial that number goes down to a mere 8%, compared with a 40% win rate in traditional patent cases.[28] Consequently, it is not uncommon for PAEs to agree to small settlements with many targets to lock in a profit, while leaving one or two defendants standing for trial in hopes of securing a large verdict.

For small and medium companies, the Hobson's choice may be no choice at all; they may not be able to afford the defense costs. Studies have shown that 55% of the companies PAEs target have $10 million or less in revenue,[29] and 82% have

revenues of less than $100 million.[30] These companies can be easy marks because they almost always have to settle.

David Friend, CEO of Carbonite, explained the magnified impact PAE suits can have on small companies. Carbonite, along with eighteen other online computer back-up businesses, was sued on "a set of obscure and nearly 20-year-old business method patents."[31] The demand was ongoing royalties plus $20 million, which Carbonite said was a third of all its money in the bank. The jury sided with Carbonite and invalidated the PAE's patents, but the suit "depressed our stock price and prevented us from growing... Also relations among my Board members were strained as arguments ensued over whether to settle or fight."[32]

The counter-narrative PAEs offer is that they bring money to small inventors. Yet PAE litigation acts as a perverse deterrent to venture capitalists, who fear litigation if the venture is successful. Also, some venture capitalists who specialize in intellectual property are investing in PAEs, viewing them as safer than individual inventors. And as the FTC concluded, PAEs hurt small inventors because they encourage paying inventors only to "invent and patent," but "not generate more innovation," which is the lifeblood for all inventors.[33] In June, the FTC announced it will launch an extensive inquiry into the impact PAEs are having on the economy.

The Impact of PAE Litigation on the Patent Property Right

Another way PAE litigation is impacting actual inventors is that courts, in trying to make it more difficult for PAEs to improperly leverage the litigation system, have altered the burdens of proof for remedies in patent infringement cases. These new standards have helped bring needed sanity to PAE litigation, but have created challenges for traditional patent holders.

In 2006, the U.S. Supreme Court, in Ebay v. MercExchange,[34] reduced access to the most powerful weapon in a patent holder's arsenal: permanently enjoining the use of the infringing technology. MercExchange, which did not engage in any commercial activity, owned patents related to hosting Internet-based sales among private individuals and alleged that Ebay was infringing on those patents. Before this case, the rule was that any patent holder who could prove infringement could get a permanent injunction "absent exceptional circumstances."[35]

In this case, the Supreme Court held that district courts could no longer impose injunctive relief as a default mechanism. Rather, a plaintiff must prove that injunctive relief is appropriate based on the traditional four-factor test for when permanent injunctions can be granted in other areas of the law. A plaintiff must demonstrate irreparable injury, that monetary damages are inadequate to redress the injury, that the hardship on the plaintiff warrants such a remedy, and that the injunction would not harm the public's interest.

Ever resourceful, some PAEs responded to this ruling by shifting the venue for their patent infringement claims to the International Trade Commission (ITC).[36] The ITC is a quasi-federal agency that can grant "exclusion orders" to bar infringing technology from being imported into the U.S.[37] Most consumer electronics are manufactured overseas, providing the ITC a platform for hearing these PAE suits. In 2011, a record 70 patent suits were filed with the ITC, though that number has reportedly waned in the past year.[38]

PAE litigation has also increased the standard of proof for proving damages in a patent infringement case. There had been a generally accepted rule that the minimum reasonable royalty rate was 25 percent of the profits from the infringing technology. In Uniloc USA, Inc. v. Microsoft Corp., the Federal Circuit abolished this rule, stating that a patent holder must demonstrate a basis in fact for establishing whatever reasonable royalty rate it seeks. In addition, the court held that patent holders could no longer base royalties on the profits of an entire product when the infringing technology does not directly contribute to those profits. In LaserDynamics v. Quanta Comp., Inc., the court refined this point, holding that royalties must be based on "the smallest salable patent-practicing unit."[39]

As a result of these rulings, remedies are now more closely focused on the facts of a case. Taking the extra steps to secure the appropriate remedy, though, can come with greater costs, risks and uncertainties. Again, these safeguards are important in stemming PAE litigation, but also add new hurdles for traditional inventors.

Progressives have been at the heart of solving many of the high-profile litigation prospecting scandals of the past decade, including in patent litigation.

Progressives Should Protect Civil Litigation from Prospecting Abuse

When attempts to game the legal system have resulted in unfair litigation results, as here, progressives have come together to find solutions. As defenders of the American civil litigation system, progressives have been at the heart of solving many of the high-profile litigation prospecting scandals of the past decade, including in patent litigation.

Judge Janis Graham Jack, a Clinton-appointee, uncovered one of the biggest systemic episodes of fraud and abuse against the American civil justice system, leading to hundreds of thousands of asbestos and silica lawsuits in the early 2000s. She found that nearly every one of the 10,000 silicosis claims consolidated before her court was purely "manufactured for money."[40] She also found that lawyers were intentionally "overwhelming the system" with massive filings "to extract mass settlements."[41] The ramifications of her ruling reverberated throughout asbestos and silica litigation.

Last year, Senator Feinstein helped clamp down on Californians who found a state cause of action for litigation prospecting involving the American with Disabilities Act (ADA). The individuals were going to small businesses looking for

technical ADA violations. They threatened or filed lawsuits, offering to drop them for less than the cost of retaining counsel. Senator Feinstein wrote to the California Legislature that "the 'shakedown' tactics . . . unfairly and unnecessarily threaten the viability of some small businesses."[42] Soon thereafter, the Legislature enacted reforms to stem these abuses.

Along these same veins, Senator Leahy's America Invents Act ended the practice of misusing whistleblower statutes to bring false marketing claims against companies merely over the fact that their products had the technical violation of having expired patent numbers on them. Also, the only major piece of civil litigation reform in the past decade, the Class Action Fairness Act, had Senator Kohl as a lead sponsor and passed with broad bipartisan support because it helped deal with litigation gamesmanship.[43]

What makes these issues ripe for progressive leadership is that in each example, as with PAE suits, the tactics at issue are pure money plays. No greater good is being served. The suits merely seek to take advantage of the inefficiencies and transaction costs of litigation.

The Search for the Right Solutions to PAE Litigation

In recognition of the need for progressive leadership, President Obama, Senators Schumer and Leahy, among others have been leading the charge against patent trolling.

In June, President Obama proposed a 12-part agenda of five executive actions and seven legislative proposals. The actions included tightening restrictions on functional claiming, requiring patent holders to provide updated patent ownership information to stop PAEs from setting up shell companies to hide their activities, educating small businesses and end-users of their rights when pursued by PAEs, and focusing resources on continuing to identify solutions.

On the legislative front, the President is seeking bills that would help businesses respond to demand letters, provide companies with access to administrative proceedings before the Patent Office to challenge the validity of business method patents, and provide trial judges with more discretion to award attorneys fees against PAEs.

In Congress, several patent litigation reform bills have been introduced. The SHIELD Act, sponsored by Reps. DeFazio and Chaffetz, requires courts to award costs and attorneys' fees to prevailing parties, but carves out several entities from this obligation, including inventors, original patent holders, those who can show a substantial investment to commercialize the product, institutions of higher education, and organizations focused on commercializing technology. In doing so, it tries to isolate PAEs by who they are, not what they do. The bill also discourages

Patent trolling adds no economic value, is a threat to our innovation-based economy, and is an affront to American ingenuity.

speculative litigation by creating bonding requirements for bringing patent infringement claims and by limiting discovery.

Several companies have advocated for an expanded "loser pays" system in patent cases because it would directly address the asymmetrical litigation costs between plaintiffs and defendants that PAEs leverage for settlements. While the U.S. personal injury bar has opposed "loser pays" in personal injury cases, policymakers can explore whether the pertinent dynamics in commercial litigation are different from those in personal injury, employment discrimination and other individual-based suits to overcome any such concerns. British civil litigation can provide a helpful guide, as loser pays is widely used in that country.

Other bills offer other approaches. Sen. Schumer's Patent Quality Improvement Act proposes to expand the PTO's Covered Business Method program to a broader range of patents and litigants. Sen. Cornyn's Patent Abuse Reduction Act would require a PAE to pay the costs of discovery if it seeks information beyond "core documentary evidence." Others have suggested a dormancy tax to raise fees for maintaining patents, which could discourage a patent holder from keeping a patent it has no intention of commercializing.[44]

State governments have also been getting involved. Vermont's legislature enacted a law in May 2013 to create a right to sue for "bad faith assertion" of a patent infringement claim. The state attorney general then sued a company, MPHJ Technology Investments LLC, that wrote to Vermont businesses saying it owned patents for attaching any scanned document to an email and demanding $1,000 per employee to license the technology. The company reportedly operated through 40 shell companies to "shield it from paying fees and costs in the event its letter's recipients prevail in litigation."[45] The Nebraska attorney general has since filed a similar suit.

These and other ideas need to be weighed carefully. The trick will be to find solutions tailored to curbing litigation prospecting, while not eroding legitimate rights of traditional patent holders. Philip Johnson of Johnson & Johnson explained at a Congressional hearing that PAEs have not invaded pharmaceutical patents, in part because of the high cost of securing a patent for a new drug. He urged that changes to the patent system to address PAE litigation against other industries should not adversely impact the patent rights of pharmaceutical manufacturers.

Conclusion

Innovation has long been the essential ingredient to U.S. economic growth. Patent trolling adds no economic value. It is an affront to American ingenuity and threatens our innovation-based economy. As Senator Leahy said, "We must combat [this] abusive behavior to preserve and advance the patent system envisioned by the founders and provided for in our Constitution."[46] When Thomas Jefferson and the other founders granted Americans the right to patent

and protect intellectual property, litigation arbitrage was not the ideal they had in mind.

Endnotes

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3 Investment Research, Envisionip, Apr. 15, 2013.

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7 See also Colleen V. Chien, Reforming Software Patents, 50 Hous. L. Rev. 325 (2012).

8 Gerard N. Magliocca, Blackberries and Barnyards: Patent Trolls and the Perils of Innovation, UC Berkeley Recent Work, Mar. 22, 2007, at 4.

9 8 Cong. Rec 307-308 (1878) (Stmt. Of Sen. Christancy)

10 Atlantic Works v. Brady, 107 U.S. 192, 200 (1883).

11 The most well-known in the late 20th Century was probably Jerome Lemelson, who generated $1.3 billion in recoveries using Selden's "submarine patent" trap, where patents applications are kept secret during long periods of intentional delay to allow others to unwittingly adopt the patented technology. In response to submarine patent abuse, Congress changed the patent term to be 20 years from the date of filing the application as opposed to 17 years from its issuance.

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13 Exxon Research & Eng'g Co. v. United States, 265 F.3d 1371 (Fed. Cir. 2001).

14 Id. at 1375.

15 Federal Trade Commission, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition 94 (2011). Other factors practitioners point to tend to be specific to areas of innovation. For example, in 1998, the Federal Circuit affirmed that the 1952 Patent Act allows one to patent "business methods," meaning that someone can patent a process for analyzing data, not just the software used for that analysis. See, e.g, State St. Bank & Trust Co. v. Signature Fin. Grp., Inc., 149 F.3d 1368, 1375-77 (Fed. Cir. 1998). Also, Mark Lemley has suggested that software patents have inherent ambiguities because they are written in a "means plus function" format. See Mark A. Lemley, Software Patents and the Return of Functional Claiming, Stanford Public Law Working Paper No. 2117302 (July 2, 2012). This practice could make sense for software patents, but has been disfavored in other contexts because, as Lemley writes, it could allow infringement claims against a product that "bears little resemblance to what the patentee actually invented." Id.

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19 See NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282, 1287 (Fed. Cir. 2005).

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25 Public Comment of Lee C. Cheng, Chief Legal Officer of Newegg Inc., Regarding the FTC and DOJ Investigation of "Patent Assertion Entities" available at http://www.ftc.gov/os/comments/pae/pae-0004.pdf.

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31 Letter from David Friend, CEO of Carbonite, to the Federal Trade Commission and the U.S. Department of Justice available at http://www.ftc.gov/os/comments/pae/pae-0059.pdf.

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34 547 U.S. 388 (2006).

35 Id. at 391 (internal quotation omitted).

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was a case generated against Blockbuster over how it charged late fees. The class action attorneys received $9.25 million in the settlement, while the class members got coupons for $1 off future rentals and the settlement allowed Blockbuster to continue charging late fees the same way it had before the lawsuit.

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About the Progressive Policy Institute

The Progressive Policy Institute (PPI) is an independent research institution that seeks to define and promote a new progressive politics in the 21st century. Through research and policy analysis, PPI challenges the status quo and advocates for radical policy solutions.

Asbestos Litigation Trend: Bankruptcy Trust Claims Transparency

Mark Behrens | Shook, Hardy & Bacon L.L.P.
December 2013

Background

- Bankruptcy Wave: 2000-2002
  - Many primary historical defendants exit the tort system
  - Now over 100 asbestos-related bankruptcies
- Disease mix changes
  - Focus on mesothelioma claims post-2005 b/c of legislative/judicial "medical criteria" reforms to address filings by the non-sick
  - *Recent rise in alleged asbestos-related lung cancer claims*
- Increasing focus on "low dose" (chrysotile) defendants
  - Makers of joint compound
  - Makers and sellers of automotive friction (brake) products
  - Makers of pumps and valves and gaskets
- Corrections occurring in legislatures and courts
  - *Rejection of plaintiff's "any exposure" theory of causation*
  - *Greater asbestos bankruptcy trust claim transparency*

2

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An increasing number of courts and legislatures are providing for greater transparency between the asbestos bankruptcy trust claim and civil tort systems.

3

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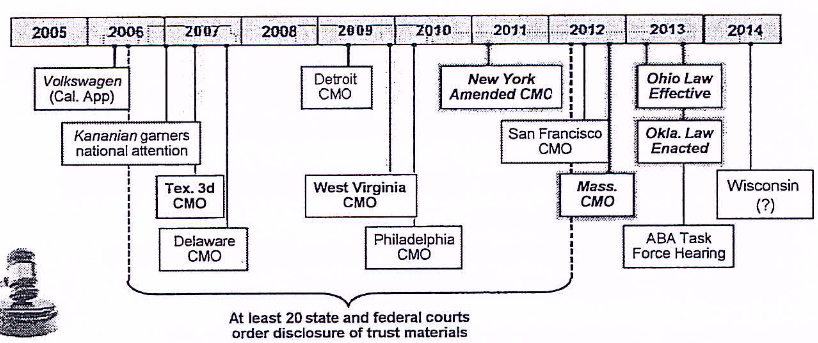
Asbestos Bankruptcy Trust Claim Transparency - Timeline



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State Laws/CMOs/Cases Governing Bankruptcy Trust Claim Transparency

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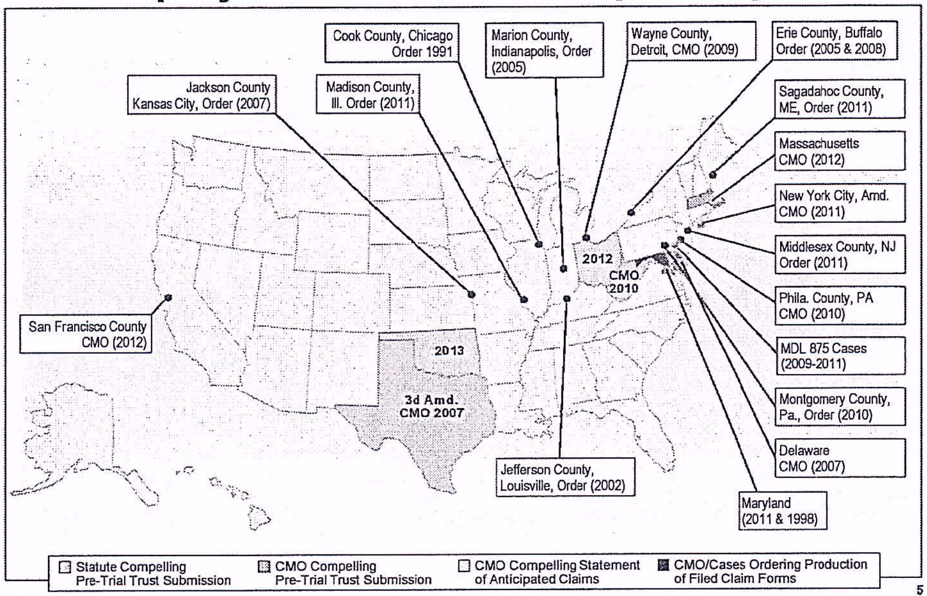

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Questions?

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